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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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July 19, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Applications for Consent To the Transfer of Control of Licenses And Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee, CC Docket No. 98-141.

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding are an original and twelve copies of the Comments of NorthPoint Communications, Inc. in response to the Public Notice (DA 99-1305), released July 1, 1999.

Would you kindly date stamp the additional copy provided herewith for that purpose and return the same to the bearer. Thank you for your assistance.

Sincerely,

Charles W. Logan

Charles W. Logan

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent To the Transfer of Control of Licenses And Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee	)))))	CC Docket No. 98-141

COMMENTS OF NORTHPOINT COMMUNICATIONS, INC.

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Summary

After extensive consultations with FCC staff, SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") have agreed to comply with a series of requirements, imposed as conditions on their proposed merger. NorthPoint Communications, Inc. ("NorthPoint") strongly supports these proposed conditions as outlined in a summary released by the Commission staff on June 29, 1999.

The conditions outlined by the staff promise to promote competition and the rapid deployment of advanced services to consumers. They represent a "win-win-win" for SBC/Ameritech, competitive local exchange carriers ("LECs"), and, most importantly, consumers. By embracing pro-competitive principles, SBC/Ameritech would gain by providing a sound basis for this Commission to move forward on their merger application. The proposed conditions would benefit competitors by giving them a level playing field on which they can enter new, primarily residential, markets. And the conditions would serve consumers by giving them competitive alternatives and new, innovative services.

The proposed conditions would promote these goals through a number of ground-breaking measures. First and foremost, they would require SBC/Ameritech to establish separate affiliates for the delivery of advanced services. This would provide a structural mechanism to ensure that competitive providers have effective, nondiscriminatory opportunities to enter new markets. The proposed conditions also would serve the public interest by, among other things, instituting significant loop discounts for the provision of advanced services, promoting line sharing, requiring prompt implementation of collocation requirements, improving competitive LEC access to operations support systems, and establishing strong penalties for noncompliance.

These measures provide an opportunity to promote competition and the deployment of advanced services consistent with the Telecommunications Act of 1996.

Of course, to fulfill their pro-competitive promise, the proposed conditions as summarized by the FCC staff must be translated into specific requirements. In many respects, the draft specific conditions SBC/Ameritech submitted on July 1, 1999, represent a carefully crafted effort to accomplish the FCC's stated pro-competitive objectives. NorthPoint recommends, however, that the draft submitted by SBC/Ameritech be clarified or modified in four areas to ensure that these objectives are achieved.

First, the proposed conditions governing the separate advanced services affiliate requirements should be revised in several respects. The conditions should make clear that SBC/Ameritech may only offer advanced services through a separate affiliate except as expressly provided in the conditions. Moreover, the nondiscrimination provisions governing the separate affiliates should be strictly construed, and compliance with these conditions should be monitored by an independent auditor. In addition, the conditions should be crafted to give SBC/Ameritech an incentive to begin providing advanced services through a separate affiliate as soon as possible, and to ensure that the three-year sunset period is not foreshortened by unnecessary delay.

Second, the conditions should implement line sharing promptly. Line sharing is critical to the deployment of competitive advanced services to residential consumers. It is technically feasible today, as demonstrated by incumbent LECs' current use of this technology. To the extent a phase-in schedule for line sharing is deemed necessary by the Commission, the four-year sunset period governing these obligations should be tied to the commencement of the obligations rather than the merger closing date as proposed by SBC/Ameritech. To facilitate further the effectiveness of these provisions, the pricing for line sharing should be based on the incumbent LEC's DSL tariff information rather than be determined by the state commissions.

Third, the proposed conditions should be modified in several respects to ensure that competing advanced services providers have full and nondiscriminatory access to operations support systems ("OSS"). It is particularly important that competitive providers have access to all essential information about the local loop at the *pre*-ordering stage to allow them to determine whether and how they can provide particular types of advanced services. The proposed conditions should also be amended to provide for a faster, more certain implementation of SBC/Ameritech's OSS obligations.

Finally, the performance measurements proposed by SBC/Ameritech should be clarified in a number of respects to ensure effective implementation of the conditions and their pro-competitive goals.

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COMMENTS OF NORTHPOINT COMMUNICATIONS INC.

NorthPoint Communications, Inc. ("NorthPoint") submits these comments on the conditions proposed by SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") in support of their proposed merger.

NorthPoint strongly supports the conditions as described in the FCC Staff Summary released on June 29, 1999[1]. Although NorthPoint recommends a number of clarifications and modifications to SBC/Ameritech's specific proposal to implement these conditions, it believes the conditions promise to promote competition and the deployment of advanced services and thereby substantially serve the public interest.

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[1] FCC Staff Summary of SBC/Ameritech Proposed Conditions, June 29, 1999 ("Staff Summary").

I. THE CONDITIONS AS OUTLINED IN THE STAFF SUMMARY PROMISE TO OPEN ADVANCED SERVICES TO COMPETITION

The merger of SBC and Ameritech, if approved, would consolidate two of the five remaining Bell Operating Companies into a single telecommunications company controlling approximately one-third of the access lines in the United States. The merged company's service territory would stretch from California to Connecticut.

The merger, as initially proposed, raised significant issues under the statutory public interest test,[2] particularly its potential impact on the growth of local competition and expanded availability of advanced services to residential consumers.[3] Consequently, SBC, Ameritech and members of the FCC staff, at the request of the Chairman,[4] engaged in discussions over a period of several weeks about those concerns. As a result of the discussions, SBC and Ameritech agreed to comply with various requirements, imposed as conditions on their merger, that would "promote the public interest and benefit consumers and competition ...."[5]

The proposed conditions were initially summarized in the Staff Summary released by the Common Carrier Bureau on June 29, 1999. Subsequently, SBC/Ameritech filed their specific

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[2] *See* 47 U.S.C. § 310(d).

[3] Letter of Chairman William E. Kennard to Richard Notebaert, Chairman and CEO, Ameritech, and Edward Whitacre, Jr., Chairman and CEO, SBC, dated April 1, 1999.

[4] *Id.*

[5] Staff Summary at 1.

proposals on July 1, 1999 (hereafter referred to as "Proposed Conditions" or the "SBC/Ameritech Proposal").[6]

NorthPoint strongly supports the conditions as described in the Staff Summary. When announced on June 30, 1999, NorthPoint noted that the proposed outline contained "several groundbreaking principles – including the creation of a separate [SBC/Ameritech] subsidiary for advanced services – that will speed the deployment of [digital subscriber line] services by promoting competition."[7] NorthPoint remains supportive of the joint effort of SBC, Ameritech and the FCC staff to implement, through a set of conditions on the merger, "fundamental pro-competitive measures that will accelerate the arrival of digital subscriber line "DSL" and other broadband services to more Americans."[8]

NorthPoint's support for the outlined conditions is significant because NorthPoint is among those carriers expected to exploit the pro-competitive opportunities in the proposed conditions to deliver the benefits of competitive broadband DSL to consumers. NorthPoint is a national, facilities-based competitive local exchange carrier ("LEC") dedicated to providing affordable, dedicated high-speed Internet access over existing telephone lines using DSL technology.[9] Promoting such advanced services, as well as entry by competitive LECs such as

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[6] *See* Letter of Richard Hetke, Senior Counsel, Ameritech, and Paul Mancini, General Attorney and Asst. Gen. Counsel, SBC, to Magalie Roman Salas, Secretary, FCC (July 1, 1999) ("Proposed Conditions" or "SBC/Ameritech Proposal").

[7] Statement of Michael Malaga, NorthPoint Chairman and CEO, released June 30, 1999.

[8] *Id.*

[9] NorthPoint operates DSL-based local networks in 20 major metropolitan areas and will expand its service to 28 metropolitan areas by the end of 1999. Upon completion of its planned expansion, NorthPoint's DSL network will pass 4 million businesses and 30 million

NorthPoint, furthers innovation and competition in the telecommunications marketplace, which the Commission has described as "fundamental goals" of the 1996 Act.[10]

The pro-competitive conditions proposed for the SBC/Ameritech are designed, among other things, to achieve several key objectives to further the deployment of competitive broadband DSL services to consumers. In this regard, the conditions outlined in the Staff Summary are a "win-win-win" for incumbent LECs, competitive LECs and consumers. Those conditions would provide a basis for the Commission to conclude that the SBC/Ameritech merger is in the public interest; they would establish fundamental, pro-competitive rules that would permit competitive LECs to enter new, primarily residential, markets; and they would serve consumers by delivering the fruits of the pro-competitive goals of the Act.

Specifically, the conditions would promote these goals in the following seven ways:

> First, by requiring that SBC/Ameritech establish separate affiliates for the delivery of advanced services in concert with other key conditions, the proposed conditions create a systemic remedy for the basic obstacle that has impeded residential competition. To date, DSL competitive LECs have been unable to offer residential service because the cost of wholesale inputs required to deliver DSL service – collocation and unbundled loops – *exceeded* the retail price of the incumbent LEC's DSL offering. This means DSL competitive LECs would lose money on every residential line they provision. The separate subsidiary requirement establishes the simple but critical rule that the incumbent LEC's advanced services subsidiary deal at arm's length with the incumbent for the purchase of collocation and loops. This would require the incumbent LEC affiliates, *for the first time*, to pay the same prices as competitive LECs for loops and collocation, eliminating the DSL price squeeze. The non-discriminatory treatment of

homes. NorthPoint provides DSL-based Internet access service -- at speeds up to 1.5 Mbps, more than 25 times faster than common dial-up modems -- through national and regional Internet service providers, CLECs, long distance carriers, value-added resellers, and other partners.

[10] *Memorandum Opinion and Order and Notice of Proposed Rulemaking* in CC Docket No. 98-147, FCC 98-188, at ¶ 1 (released Aug. 7, 1998).

all competitive LECs, including the separate affiliate, also would require that the affiliate wait in line for collocation, petition to open "closed" offices, and otherwise deal with the same collocation and operations support systems ("OSS") implementation problems experienced by competitive LECs. Once the incumbent LEC affiliates begin to suffer these burdens, NorthPoint is confident that the incumbent LECs will find the incentive and ability to fix these problems for all competitive carriers.

Second, the conditions institute significant loop discounts for the provision of advanced wireline DSL services. Upon the merger closing, DSL competitive LECs will – until line sharing is implemented and operations support systems are brought into compliance – obtain a discount of more than 60% off the recurring charges for unbundled loops used to provide asymmetric DSL service and a 25% discount off the recurring charges for unbundled loops used to provide other advanced services. Because of the intense competition among DSL competitive LECs, these discounts will quickly translate into lower prices and substantially broader DSL deployment, particularly for residential consumers.

Third, the merger sets a schedule, subject to certain conditions, for the implementation of competitive LEC line sharing. The plan to implement line sharing first with the separate affiliate and then with competitive DSL competitive LECs demonstrates that line sharing is both technically and operationally feasible. The merger conditions anticipate that line sharing will be implemented on a relatively near-term schedule (6-18 months) subject to certain conditions. Line sharing is absolutely critical for affordable residential broadband service.

Fourth, the merger conditions require prompt implementation of the Commission's collocation remedies. Prior to the merger closing, the SBC/Ameritech applicants must demonstrate compliance with, and third-party verification of, the FCC collocation order of March 1999, which included dozens of collocation remedies and alternatives intended to reduce cost and delay for collocation.

Fifth, the merger conditions require that SBC/Ameritech improve access to their OSS in order to facilitate robust and scalable competition in their region, particularly for advanced services provided for facilities-based carriers like NorthPoint. SBC/Ameritech must implement improvements to assist competitive LECs in ordering unbundled network elements ("UNEs"), including DSL, and implement an electronic data interchange. The Proposed Conditions also waive any charges for obtaining access to these advanced services OSS. This OSS relief is essential to permit scalable DSL service and massive residential deployment.

Sixth, the merger conditions propose to assess liquidated damages and fines and to impose related enforcement penalties in the event that SBC/Ameritech's performance falls short of prescribed levels. This enforcement scheme is intended to impose substantial penalties on SBC/Ameritech for failing to live up to their commitments and thereby to create a direct economic incentive for SBC/Ameritech to cure performance problems quickly.

> Seventh, the conditions establish a timetable for SBC/Ameritech to initiate out-of-region competition as a competitive LEC. This require increases the probability of competition, provides competitive LECs with additional partnering opportunities, and – through the most favored nation provisions in the conditions – gives other competitive LECs the advantages of the substantial bargaining power enjoyed by the SBC/Ameritech out-of-region affiliates.

Although the fundamental conditions outlined in the Staff Summary represent a major breakthrough in promoting the deployment of competitive services to consumers, there are several areas in the draft submitted by SBC/Ameritech that require clarification or modification to ensure that the goals in the outlined conditions are achieved. In the following sections, NorthPoint suggests such clarifications and modifications to the four areas of primary interest to DSL competitive LECs – the separate affiliate requirement, line sharing, the implementation of robust OSS for the delivery of advanced services using unbundled network elements, and the establishment of effective performance measures. As is clear from the comments below, and will likely be emphasized and detailed in the comments of other parties, there are a number of areas where the draft submitted by SBC/Ameritech, intended to reflect the conditions negotiated with FCC staff, requires clarification or modification to ensure that the pro-competitive goals of the conditions are achieved. NorthPoint is confident that these clarifications and modifications are consistent with the "win-win-win" objectives of the conditions and that they can promptly be adopted to ensure that the benefits of the conditions are delivered to consumers.

As a threshold matter, it bears mention that the Proposed Conditions should be viewed as supplementing, but not supplanting, generally applicable telecommunications regulations that apply to these carriers. NorthPoint recommends that the conditions imposed on the SBC/Ameritech merger make clear that they do not relieve SBC/Ameritech from complying with industry-wide requirements that may be imposed by this Commission or the states in other proceedings.

II. PROPOSED CONDITIONS GOVERNING THE SEPARATE ADVANCED SERVICES AFFILIATE SHOULD BE REVISED TO ENSURE THEY ACHIEVE THE COMMISSION'S PUBLIC INTEREST GOALS

In NorthPoint's view, no provision of the Proposed Conditions is more vital to achieving the Commission's goals of greater local competition and accelerated deployment of advanced services than the requirement that SBC/Ameritech establish one or more separate affiliates to offer Advanced Services in their region. Among other things, the Staff Summary states that the separate affiliate would be required to "operate independently from the telephone company, except that operation, installation and maintenance functions may be performed by telephone company personnel on a non-discriminatory basis, and both the affiliate and telephone company may market the other's services ...."

NorthPoint has been a vigorous advocate for the establishment of separate advanced services affiliates by incumbent LECs. To further this objective, consistent with the principles set forth in the Staff Summary, the SBC/Ameritech Proposal should be clarified in several areas.

A. Advanced Services Should Be Provided Through Separate Affiliate Except As Specifically Provided In The Conditions.

The SBC/Ameritech Proposal specifies exceptions and a sunset period for the separate affiliate requirement. In particular, paragraphs 28 creates an exception in the event the affiliate is deemed by a court or other body to be a successor or assign of a BOC under section 153(4)(B) of the Act), and paragraph 39 sets forth the sunset provisions. The conditions should make clear that these are the *only* exceptions to the separate affiliate requirements. In particular, NorthPoint suggests that the first sentence of paragraph 25 be revised to read as follows: "Except as provided in paragraphs 28 and 39 herein, SBC/Ameritech shall provide Advanced Services *only* through one or more affiliate(s) in accordance with the provisions and schedule set forth below."

B. Nondiscrimination Requirements Should Be Strictly Construed.

Paragraph 27 of the SBC/Ameritech Proposal sets forth the general nondiscrimination requirement governing the separate affiliate-SBC/Ameritech incumbent LEC relationship. This provision is critical to ensuring, as stated in the Staff Summary, that SBC/Ameritech "treat the affiliate as they would any competitor." Consistent with this nondiscrimination requirement, the conditions should make clear that the separate affiliate is subject to the same terms, conditions and procedures as the competitive LEC in obtaining collocation, access to OSS, and operations, installation, and maintenance ("OIM") services.

Joint marketing "exceptions" should be clear. Sub-paragraph 27.a. provides an exception from the nondiscrimination requirement to permit joint marketing by the SBC/Ameritech incumbent LEC and the separate advanced services affiliate. SBC/Ameritech should not be permitted to rely on this exception to engage in joint pricing promotions on an exclusive basis. NorthPoint recommends that this sub-paragraph be revised to require SBC/Ameritech incumbent LECs to offer to enter into such joint promotional arrangements on a non-discriminatory basis with unaffiliated providers of advanced services. Thus, for example, if an SBC/Ameritech incumbent LEC and advanced services affiliate offered customers two months of free voice service if they also subscribe to the affiliate's advanced services, SBC/Ameritech should be required to offer to enter into the same arrangement with an unaffiliated advanced services provider. Alternatively, the joint marketing arrangements between SBC incumbent LECs and their affiliates should be limited to joint advertising, order processing and other activities that do not involve pricing. Absent these revisions, SBC/Ameritech could use joint marketing arrangements to leverage their dominant position in the voice market to gain an anti-competitive advantage in the advanced services market.

C. The Provision Regarding The Effect Of A Judicial or Administrative Order Finding An Affiliate To Be A Successor Or Assign Of A BOC Should Be Clarified.

Paragraph 28 of the SBC/Ameritech Proposal governs the transfer of advanced services equipment from an SBC/Ameritech incumbent LEC to a separate affiliate. The paragraph ends by stating that

> "[s]uch separate affiliate(s) shall not be deemed a successor or assign of a BOC for purposes of applying 47 U.S.C. § 153(4)(A) as a result of such transfer. Provided, however, that if any portion of this paragraph is found invalid or is otherwise overridden by a judicial or administrative order, SBC/Ameritech shall not have any separate affiliate obligations with respect to Advanced Services."

NorthPoint suggests that this last sentence be revised to mirror the preceding sentence and describe more precisely the type of judicial or administrative decisions that would warrant relieving SBC/Ameritech of its separate affiliate obligations. In particular, this last sentence should read: "Provided, however, that if such transfer is deemed by a judicial or administrative order to render the separate Advanced Services affiliate(s) a successor or assign of a BOC for purposes of applying 47 U.S.C. § 153(4)(B), SBC/Ameritech shall not have any separate affiliate obligations with respect to Advanced Services." [11] Moreover, it may be useful to add a further clarifying sentence that is patterned after the final sentence in paragraph 39: "such a judicial or administrative decision that is based solely on some other conduct of, or relationship between,

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[11] The SBC/Ameritech Proposal cites § 153(4)(A) of the Act, but the correct cite is to § 153(4)(B).

the incumbent LEC and/or the separate advanced services affiliate shall not be a basis for terminating any of the separate affiliate provisions of this Section VII."

Moreover, in the event that the separate affiliate requirement were eliminated under this provision, the Proposed Conditions should state clearly that SBC/Ameritech would remain obligated to, comply with the line sharing, among other things, discounted unbundled loop process, access to enhanced OSS, and collocation sections. Those requirements would become even more important if the separate affiliate were no longer mandated.

D. The Proposed Conditions Should Create An Incentive for SBC/Ameritech to Begin Providing Advanced Services Through A Separate Affiliate As Quickly As Possible and Should Ensure that the 3 Year Sunset is Not Foreshortened By Unnecessary Delay

Subparagraphs a-c of paragraph 30 of the Proposed Conditions set forth firm dates by which SBC/Ameritech must establish separate advanced services affiliates. Under these provisions an SBC/Ameritech incumbent LEC that is providing advanced services on the merger closing date must establish a separate affiliate prior to that date. An SBC/Ameritech incumbent LEC that seeks to begin to provide advanced services some time after the closing must establish the separate affiliate before offering those services.

Subparagraph d, however, injects a considerable amount of uncertainty and potential delay in this schedule. It provides that

> "[n]otwithstanding the provisions of sub-paragraphs a, b, and c, ... SBC/Ameritech may provide Advanced Services through an SBC/Ameritech incumbent LEC in any State until SBC/Ameritech has obtained all necessary State approvals to provide Advanced Services through the separate Advanced Services affiliate in that State."

This raises a concern that a protracted state proceeding regarding such approval would permit the SBC/Ameritech incumbent LEC to offer advanced services for a significant period of time in the absence of the important safeguards imposed by the separate affiliate requirements.

To strengthen SBC/Ameritech's incentive to begin providing advanced services through a separate affiliate as promptly as possible, the Proposed Conditions should be revised to prohibit SBC/Ameritech incumbent LECs from providing advanced services to new customers six months after the closing date of the merger. This would give SBC/Ameritech a reasonable period to obtain the necessary state approvals, since it can begin that process immediately. At the same time, this revision would ensure that SBC/Ameritech incumbent LECs do not have an open-ended grant of authority to continue to provide advanced services.

E. The Phase-In Period For Providing Advanced Services Through A Separate Affiliate Should Be Clarified

Paragraph 31 of the Proposed Conditions establishes a phased schedule for SBC/Ameritech's provision of advanced services through a separate affiliate. For customers in SBC states that are providers of Internet services, both new activations (subparagraph b) and existing customers (subparagraph c), the terms of the phase-in schedule are "established in recognition of, and are expressly contingent upon, the fact that the FCC has determined that Advanced Services used to provide Internet services are interstate services." NorthPoint assumes that this provision seeks to address the (unlikely) possibility that advanced services used to provide Internet services in the future might be deemed to be intrastate services. In that event the SBC/Ameritech incumbent LEC may well need to obtain a certificate of public convenience and necessity or other authorization from the relevant state commission to furnish services to Internet access providers.

NorthPoint suggests that this paragraph be clarified by revising the last sentence of both sub-paragraphs b and c to state: "The terms of this sub-paragraph [b/c] are established in recognition of the fact that the FCC has determined that Advanced Services used to provide Internet services are interstate services. In the event such services are deemed intrastate in nature and a certificate of public convenience and necessity ("CPCN") or other comparable authorization must be obtained from a state commission to provide these services, the obligations set forth in this sub-paragraph [b/c] shall commence no later than 30 days after issuance of such CPCN or other authorization."

F. Compliance with the Separate Affiliate Requirements Should Be Monitored By Independent Audit

Although the Proposed Conditions provide for an independent audit of SBC/Ameritech's compliance with the FCC's collocation rules, no audit of the activities between the SBC/Ameritech incumbent LECs and their advanced services affiliates is required. Indeed, paragraph 27 omits any reference to the audit provisions of section 272.

Audits are essential for ensuring that SBC/Ameritech incumbent LECs treat their advanced services affiliates on an arm's-length, non-discriminatory basis. NorthPoint, therefore, recommends that paragraph 27 be revised to make the advanced services separate affiliate subject to section 272(d), 47 U.S.C. § 272(d), which provides for an independent audit of separate affiliate transactions. In the alternative, a separate provision should be added that requires at least a single comprehensive audit of the SBC/Ameritech incumbent LEC-separate affiliate transactions no later than 12 months after establishment of the affiliates in each state.

In addition, subparagraph 27.b. includes a phrase that suggests that public disclosure of transactions between the affiliate and the incumbent LEC may be quite limited. This clause, therefore may be contrary to section 272(b)(5), to which the separate affiliate would be subject, and should be stricken.

III. THE LINE SHARING CONDITIONS SHOULD BE CLARIFIED AND REVISED TO CONFORM MORE CLOSELY TO THE STAFF SUMMARY.

As NorthPoint previously has explained, line sharing is essential to the rapid deployment of advanced services, particularly to residential customers.[12] The Commission itself recognized in its *Advanced Services* proceeding that line sharing can promote consumer choice and enable competition for advanced services to grow more rapidly.[13]

NorthPoint is consequently heartened by the fact that the Proposed Conditions explicitly address the provisioning of line sharing to unaffiliated providers of advanced services. The SBC/Ameritech Proposal, however, falls short of what is needed to ensure that line sharing is provided on a nondiscriminatory basis so that, as the Staff Summary states, "the SBC-Ameritech telephone companies will treat [their] affiliate[s] as they would any competitor." NorthPoint recommends the changes described below to ensure that the Proposed Conditions accomplish this objective.

A. Line Sharing Is Technically Feasible And Should Not Be Delayed.

Under Paragraph 33 of the Proposed Conditions, SBC/Ameritech would not be required to provide line sharing to unaffiliated competitors until after a phase in-period of up to 12 months that would be triggered when: (1) "the Commission determines that it is technically feasible to provide line sharing as described in the further NPRM issued in CC Docket 98-147 (rel. March 31, 1999) and in a manner that permits multiple CLECs to have access to a high frequency

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[12] NorthPoint Comments in CC Docket No. 98-147 (filed June 15, 1999).

[13] *First Report and Order and Further Notice of Proposed Rulemaking* in CC Docket No. 98-147, FCC 99-48, at ¶ 96 (released March 31, 1999) ("*Advanced Services FNPRM*").

channel riding over the same loop as an SBC/Ameritech incumbent LEC-provided voice grade service," and (2) "the equipment to provide such line sharing becomes available, based on industry standards, at commercial volumes." Moreover, the Proposed Conditions would permit SBC/Ameritech to begin providing advanced services immediately to consumers through its affiliates over access lines that are shared with an SBC/Ameritech incumbent operating company.

NorthPoint submits that this disparate treatment – and the attendant delay in delivering consumer broadband service competition – is neither justified by technical considerations nor consistent with the Staff Summary. NorthPoint previously has demonstrated in its comments in the *Advanced Services* proceeding that line sharing is technically feasible today, as evidenced by the existence of technical standards promulgated by a nationally recognized organization.[14] The Commission has tentatively concluded that "[w]e find nothing in the existing record to persuade us that line sharing is not technically feasible. In fact, incumbent LECs are already sharing the line for the provision of both voice and advanced services."[15] SBC did not, in its comments in the *Advanced Services FNPRM*, take issue with this tentative conclusion. Indeed, the fact that SBC/Ameritech proposes to implement *immediately* line sharing with its arm's-length affiliate demonstrates that line sharing with third parties, including competitive LECs, is technically feasible *today*. In these circumstances, NorthPoint submits that SBC/Ameritech need not and

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[14] *See* ANSI T1. 413 ADSL standard. *See* also NorthPoint Comments in CC Docket No. 98-147, at 17-23 (filed June 15, 1999).

[15] *Advanced Services FNPRM* at ¶ 103 (footnotes omitted). *See also* NorthPoint Comments in CC Docket No. 98-147, at 18-20 (filed June 15, 1999).

should not delay the offering of line sharing to unaffiliated competitive LECs until the Commission formally rules that such line sharing is technically feasible.

Paragraph 33 is also confusing because it refers to line sharing *"in a manner that permits multiple CLECs to have access to a high frequency channel riding over the same loop as an SBC/Ameritech incumbent LEC-provided voice grade service."* NorthPoint understands this phrase to mean that different competitive LECs could compete to provide ADSL service to an end user over the shared loop, and not that the loop is capable of permitting several competitive LECs to provide ADSL services over the same shared loop at the same time. Consequently, the quoted passage should be revised to eliminate that ambiguity.

The condition regarding commercial availability of specific "equipment" that is required for an incumbent SBC/Ameritech local exchange carrier ("LEC") to provide line sharing is also unnecessary and may serve as a basis for delaying the consumer benefits of line sharing. The only additional equipment that is necessary promptly to implement line sharing is a stand-alone passive filter device to "split" data and voice, and these are already available from international vendors such as Cisco Systems, Newbridge Networks, and Willcom. Since the necessary equipment is currently available, subsection (b) of paragraph 33 can and should be deleted. In the event that SBC/Ameritech claim that other new equipment is needed to implement line sharing, that equipment should be specified as well as a method for determining its availability that is not dependant on SBC/Ameritech.

To remedy the deficiencies related to line sharing, NorthPoint submits that Paragraph 33 should be revised to require promptly the provision of line sharing to unaffiliated providers of advanced services to residential customers. NorthPoint recognizes that certain subsidiary technical issues need to be clarified in order to implement line sharing, such as specifying the spectrum within which the advanced services may operate.[16] There is no reason, however, to delay progress toward resolution of these issues. Indeed, the fact that SBC/Ameritech propose to offer line sharing in an arm's-length transaction to the advanced services affiliate is evidence that technical and operational issues for line sharing with third-parties can be overcome. Since competitive LECs only propose to offer line sharing for ADSL service in the same manner as the advanced services affiliate, and since SBC/Ameritech affiliates will be able to offer advanced services over a shared line as soon as they are formed, any delay in implementing line sharing with competitive LECs disserves consumers and competition without cause.

NorthPoint also notes that proposed conditioning charges for DSL capable loops, referenced in paragraph 24 and detailed in Attachment C, would – if permitted – defeat the benefits of the Line Sharing Surrogate loop rates. The proposed lower prices for DSL loops (more than 60% for ADSL, and 25% for other DSL loops) will immediately make DSL accessible to a larger population. Nevertheless, that potential benefit could be undermined significantly if SBC/Ameritech were permitted to assess the line conditioning changes listed in Attachment C. In NorthPoint's experience these conditioning charges would be the highest generally applicable rates for line conditioning charges in the nation. In contrast, NorthPoint understands that SBC proposed in Texas to waive any line conditioning charges for an interim period. Further NorthPoint understands that last week the Connecticut Department of Public Utility rejected SBC's proposal to impose DSL loop conditioning charges similar to those proposed in Attachment C. Accordingly, the conditioning charges in attachment C should be

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[16] *See, e.g.,* Comments of SBC in CC Docket No. 98-147, at 28 (filed June 15, 1999).

significantly reduced to be consistent with efficient pricing for line conditioning. Moreover, Attachment C should be revised to make clear that conditioning charges may be assessed only where conditioning work in fact is required and may not be assessed to condition a line which would not require such conditioning if the incumbent LEC's network were configured efficiently.

B. Line Sharing Pricing Should Be Based On The Incumbent LEC's DSL Tariff Information

After SBC/Ameritech is required to offer line sharing to unaffiliated advanced services providers, paragraph 33 of the SBC/Ameritech Proposal directs that "line sharing capability be provided by SBC/Ameritech's incumbent LEC in a state at rates and other terms and conditions as determined by the State Commission in accordance with the 1996 Telecommunications Act, and will be offered in a non-discriminatory manner to both the separate Advanced Services affiliate and unaffiliated providers." NorthPoint fully supports the nondiscrimination principle embodied in this provision. It previously has shown, however, that there is a simple alternative to state rate proceedings for establishing non-discriminatory charges for line sharing.

Specifically, as discussed in its comments in the line sharing rulemaking,[17] the Commission should revise paragraph 33 to require SBC/Ameritech to ensure that prices for access to a shared line by an unaffiliated provider do not exceed the costs set forth in the material filed by SBC/Ameritech incumbent LECs in support of their interstate tariffed rates for DSL service – at least as an interim measure until such time as final rates are set. In particular, the loop cost assigned by the SBC/Ameritech incumbent LEC to the shared line should not be

[17] NorthPoint Comments in CC Docket No. 98-147, at 31 (filed June 15, 1999).

permitted to exceed the loop cost assigned to its own DSL retail offering, as documented in the cost support information submitted with its tariff. These requirements will ensure nondiscriminatory and pro-competitive pricing for line sharing.[18]

C. "Voice Grade Service" Should Be Defined.

Paragraph 34 contains several references to "voice grade service" but that term is not defined. In particular, under sub-paragraph c, an unaffiliated provider's entitlement to the Surrogate Line Sharing charges is contingent on its use of the discounted access line solely for advanced services and not for "voice grade service." NorthPoint does not object to the proposed restriction, but it should be clarified. Specifically, the term "voice grade service" should be defined in the Proposed Conditions as it is defined in SBC's interstate access tariff as the transmission of an analog signal within an approximate bandwidth of 300-3000 Hz.

Other references in connection with line sharing or the Surrogate prices should be clarified. The ADSL "spectral map" in subparagraph (c) should refer to the ANSI ADSL T1.413 standard, not to an "SBC/Ameritech technical publication" that is subject to unilateral change.

D. Sunset Provisions Should Be Tied To The Commencement Of Line Sharing Obligations.

Paragraph 39 of the SBC/Ameritech Proposal provides generally for the sunset of the separate advanced services affiliate condition three years after the merger closing date, although certain conditions, including those regarding line sharing, would continue for an additional year, as provided in paragraph 40. NorthPoint is concerned that this is too short a period, especially if the commencement of the line sharing obligations is delayed by the technical feasibility and commercial availability provisions of paragraph 33. Even if those two conditions were met by the end of 1999, SBC/Ameritech would not be obligated under the terms of the Proposed Conditions to begin offering line sharing to unaffiliated providers until the end of 2000.

As discussed above, there is no basis for delaying the offering of line sharing to unaffiliated providers for many months and possibly years. If the Commission nonetheless adopts those conditions, the Commission should also extend the sunset date. Specifically, NorthPoint recommends that the Commission amend the conditions to require SBC/Ameritech to comply with paragraphs 33 and 34 for a minimum period of four years after the last date when the merged company or its affiliates begin offering advanced services over a shared line to customers in any state in its region. Although far from optimal, the line sharing conditions, with these changes, would provide NorthPoint and other data competitive LECs with at least a four year period during which they would have the benefits of either discounted unbundled loop prices or access to line sharing in attempting to compete with the SBC/Ameritech affiliate.

In addition, the Proposed Conditions do not address the treatment of an unaffiliated competitor's existing customer base in the event that SBC/Ameritech were no longer required to offer line sharing. NorthPoint submits that paragraph 34 should be revised to clarify that SBC/Ameritech would be required to continue to offer line sharing to the competitive LECs' existing end-user customer base that is served by means of shared lines.

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[18] *Id.*

IV. THE PROPOSED CONDITIONS GOVERNING OPERATIONS SUPPORT SYSTEMS SHOULD BE REVISED TO ENSURE THAT COMPETING ADVANCED SERVICE PROVIDERS CAN PROVIDE SERVICE EFFICIENTLY

The Commission has recognized the importance of giving competitive LECs nondiscriminatory access to an incumbent LEC's OSS so that the competitive LEC can make an independent determination as to whether the local loop is capable of supporting its xDSL equipment.[19] The Staff Summary of the SBC/Ameritech conditions similarly recognizes the importance of this issue, stating that "SBC-Ameritech will develop and deploy common electronic OSS for pre-ordering and ordering xDSL and other advanced services to be used by competitors and its new advanced services affiliate." The staff description further provides that "SBC-Ameritech will collaborate with competitors to deploy nondiscriminatory, uniform OSS application-to-application interfaces (*i.e.*, Electronic Data Interchange ('EDI')), graphical user interfaces, and business rules in all 13 states."

Sections III-V of the SBC/Ameritech Proposal set forth a number of conditions regarding OSS. The clarifications of and modifications to these provisions recommended by NorthPoint are designed to promote nondiscriminatory access to these essential systems.

A. The Waiver of the OSS Access Charges Should Be Clarified.

Paragraph 18 of the SBC/Ameritech Proposal provides that the merged company will eliminate, for a period of three years, "all charges for use of its standard electronic interfaces for accessing OSS that support the pre-ordering, ordering, provisioning, maintenance/repair, and billing of resold services" and various specified UNEs. The same paragraph permits

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[19] *Memorandum Opinion and Order and Notice of Proposed* Rulemaking in CC Docket No. 98-147, FCC 98-188, at ¶ 157 (released Aug. 7, 1998).

SBC/Ameritech "to recover the costs of developing and providing OSS to competitive LECs through the pricing of UNEs or resold services." NorthPoint recommends that this provision be clarified to specify that SBC/Ameritech may not recover the waived OSS access costs through charges for research and development costs that SBC/Ameritech is permitted to recover in its rates for unbundled network elements.

Paragraph 18 also limits the waiver of OSS usage charges to processing orders that are received electronically. This is reasonable if the inability to process an order electronically is caused by the competitive LEC's lack of technical capability. But if an order must be processed on a non-electronic basis because of the insistence of an SBC/Ameritech incumbent LEC, then the competitive LEC should still be entitled to the waiver of usage charges. The incumbent LEC would otherwise have a perverse incentive to continue inefficient, manual methods for processing OSS access orders.

B. The FCC Should Resolve Disputes Regarding Small competitive LEC Eligibility For OSS Assistance.

Section V of the SBC/Ameritech Proposal contains measures for assisting small competitive LECs, *i.e.*, competitive LECs "with less than $300 million in total annual telecommunications revenues, excluding revenues from wireless services." Paragraph 19 states that "[d]isputes relating to the application of this definition may be resolved by the appropriate state commission(s)."

This "verification" condition is unnecessarily burdensome; it may require small competitive LECs with limited resources to become involved in proceedings before multiple state commissions in order to obtain what, in the end, may be modest benefits. NorthPoint suggests that an eligible competitive LEC certify that it satisfies the definition for "small competitive LEC." If SBC/Ameritech wishes to dispute the certification, the issue should be resolved by the Chief of the FCC's Common Carrier Bureau or some other FCC official designated by the Commission or Bureau. This approach would provide a more uniform, expedited resolution of disputes regarding this issue. It is also more appropriate for the FCC, rather than the state commissions, to resolve such disputes since they arise from a set of conditions imposed by the Commission.

C. Competing Providers of Advanced Services Should Have Access To Essential Loop Information At The Pre-Ordering Stage.

Access to complete loop qualification information at the pre-ordering stage is critical to the ability of NorthPoint and other competitive LECs to provide advanced services to consumers promptly and efficiently. Indeed, NorthPoint and others typically need access to more extensive loop information at that stage than the incumbent LECs' retail operations, because competitive LECs usually offer a broader array of advanced services.

Paragraphs 21-22 of the Proposed Conditions, however, limit competing LECs, at the pre-order stage, to "the same loop pre-qualification information that is available to SBC/Ameritech's *retail* operations ...." (Emphasis added.) This is unduly restrictive, as it would deny NorthPoint and others access to information they need to determine whether and how they can provide their particular types of advanced services.

In contrast, the Staff Summary of the SBC/Ameritech conditions did not limit OSS access to what would be relevant to ADSL or SBC/Ameritech's "retail operations." It instead calls on SBC/Ameritech to "develop and deploy electronic OSS for pre-ordering and ordering xDSL and other advanced services to be used by competitors and its new advanced services affiliate." Consistent with this description, and to ensure OSS access for more advanced technologies, NorthPoint recommends that the conditions require SBC/Ameritech initially to provide, at the *pre-order* stage, competitive LECs nondiscriminatory access to the same pre-qualification and loop qualification information that SBC/Ameritech is required under paragraph 23 to provide at the loop order stage.

In addition, the information made available to competitive LECs at the pre-order stage should include: loop gauge; loop length; whether the loop contains bridge taps as well as the number, length and approximate location of such bridge taps; the number of load coils and repeaters; whether there are pair-gain devices, digital loop carriers ("DLCs"), digital added main lines ("DAMLs") or other devices that might impair digital services; and whether there is an alternative copper loop on which DSL services could be provisioned with less, or no, conditioning. An incumbent LEC's retail operations may not need this information to offer ADSL service, but competitive LECs need these data to determine whether they can offer advanced services over a twisted copper pair.

Moreover, NorthPoint understands that incumbent LECs are currently creating electronic databases of loop information that may include that data that competitive LECs need. To ensure that competitive LECs offering innovative DSL services can offer their services over unbundled loops in the merged company's service territory, SBC/Ameritech should be required to make access to the necessary loop information available to such competitive LECs. It is not enough to provide only access to the information that is furnished to the incumbent LECs retail operations, because that information currently is relevant only to the provision of ADSL services. The availability of the necessary data at the pre-order stage would permit competitive LECs to make informed decisions about what services can be offered over particular loops and the cost of conditioning.

D. The Implementation Timetable For OSS Obligations Is Too Uncertain And Prone To Delay.

NorthPoint is concerned that the timetable set forth in the SBC/Ameritech Proposal for implementation of the various OSS obligations is too uncertain and subject to delay. In stark contrast, the provisions for sunsetting these obligations are quite clear: they expire three years after the merger closing date unless the FCC extends the conditions for noncompliance reasons (*see* paragraph 68). The implementation timetable for many of the obligations is so amorphous and contingent that they may only go into effect only months before, and possibly not at all, the conditions sunset. As presently worded, many the proposed conditions -- and their purported public interest benefits -- may never take effect.

The proposed timetable in paragraph 11 for development and deployment of uniform application-to-application interfaces and graphical user interfaces for OSS provides an illustrative example. The Proposed Conditions give SBC/Ameritech five months to develop a development and deployment plan, and then provide one month for SBC/Ameritech and *all* participating competitive LECs to reach a written agreement on the plan. If such a consensus is reached, SBC/Ameritech then has 18 months to implement the agreed-upon plan. Thus, in the *best-case* scenario, SBC/Ameritech is not required to implement the necessary OSS interfaces until 24 months after the merger closing date, *or one year before the sunset of the OSS obligations.*

The adverse effects for competitive LECs, of course, would be even greater if SBC/Ameritech and competitive LECs cannot reach a unanimous agreement on a development and deployment plan. In that event, SBC/Ameritech (but not the competitive LECs) submit their plan to the Chief of the FCC's Common Carrier Bureau, who may direct the implementation of the SBC/Ameritech plan (but not a plan proposed by a competitive LEC) or refer the whole matter to arbitration. Arbitration, of course, would delay implementation of the electronic OSS interfaces even further, most likely beyond the sunset date. Indeed, for that reason, the value and purpose of the arbitration provisions appear highly questionable.

The timetable for developing a software solution or uniform business rules for completing competitive LEC local service requests provides another example of the problems with the proposed timetable. Paragraph 14 of the Proposed Conditions provides SBC/Ameritech 30 months -- or *six months before the sunset date* -- to complete this task. And this timetable assumes that SBC/Ameritech and all the interested competitive LECs can reach unanimous agreement on a software solution or uniform business rules within one month. If they cannot, the matter is referred to the Chief of the Common Carrier Bureau who, as with the OSS interfaces plan, can direct that the SBC/Ameritech proposal be adopted or send the dispute to arbitration. Again, the process for handling competitive LEC local service orders may very well not be in effect before the Proposed Conditions would sunset SBC/Ameritech's obligation to use that process.

NorthPoint urges the Commission to amend the proposed conditions to establish shorter and more rigorous timetables. Alternatively, in the event that the timetable cannot be compressed, the Commission should extend the sunset deadlines so that they are tied not to the merger closing date, but rather to SBC/Ameritech's implementation of the OSS conditions. For example, the conditions covering OSS access could sunset three years after SBC/Ameritech has begun to provide access to its enhanced OSS. Such a requirement would ensure that the conditions that the improved OSS access for competitive LECs has a meaningful impact and result in real, rather than asserted, public interest benefits.

V. THE PROPOSED PERFORMANCE MEASUREMENTS AND REMEDIES ARE CONFUSING AND MAY NOT BE EFFECTIVE

The performance measures submitted by SBC/Ameritech to reflect the proposed conditions are helpful, but incomplete and, in some cases, require clarification and modification. While there are a number of areas in the performance measures that should be subject to clarification and discussion, preferably in a workshop with the Commission, competitive LECs, and SBC/Ameritech, NorthPoint focuses on three key areas in the draft that should be rectified: the inclusion of DSL unbundled loops and OSS in the measures, the elimination of "parity" measures in favor of strict intervals, and clarification to ensure that loopholes in the measures – such as uncertain measurement intervals and the ability of SBC/Ameritech to "game" intervals by re-initiating orders – not defeat the benefits of the measures.

A. Performance Measures Should Be Clarified to Include DSL Loops and To Reflect the Goals of the Performance Measures.

The performance measures set forth in Attachment A are a subset that were lifted, almost without modification, from proposed performance measures being advanced by SBC in Texas. Indeed, in many instances performance measures proposed in Attachment A refer specifically to Southwestern Bell Telephone or the Texas Commission. Several of the performance measures contain terms, such as "specials" or "complex" orders, that are undefined and, if construed to exclude DSL capable loops and related advanced services requirements, would substantially undermine the benefit of these performance measures for promoting advanced services. Specifically, the performance measures should be modified where appropriate to ensure that DSL capable loops, such as DSL and ISDN unbundled loops, are *explicitly* included in the entire set of performance measures. For example, Measure 1 sets different performance requirements for "complex" loops and UNE loops, but does not specify the classification of DSL loops. This measure should be clarified to ensure that DSL loops are treated as UNE loops. Measurement 2c (UNE missed due dates) excludes "specials," but does not define specials. Similar exclusions appear in measures 3c, 4c, 5c, 8b, 9c, 10c, and 11c. Given the importance the Commission has attached to the deployment of competitive advanced services, clearly the Commission as well as competing providers need to be able to measure SBC/Ameritech's performance in delivering the elements that NorthPoint and other competitive LECs need to offer service.

SBC/Ameritech commits in paragraph 23 to provide loop makeup information to permit competitive LECs to provide advanced services to end users. As discussed above, loop makeup information should be provided in the pre-order stage. In addition, performance measure 7, titled "Average Response Time for Loop Make Up Information," should be modified, because it currently only measures the time required to provide loop qualification for the ADSL product. Such specific, qualified loop information is generally insufficient for purposes of deploying other DSL services deployed and, falls far short of the requirement to provide loop makeup data as set forth in paragraph 33.

B. "Parity" Measurements Should Be Supplanted By Strict Intervals for the Provision of UNE Loops and Related Services

A number of the performance measures test whether the provision of services to competitive LECs are at, or near, parity with SBC/Ameritech's retail analogs. In general, parity measurements – and related parity provisioning intervals –undermine rather than to foster competition between incumbent LECs and competitive LECs. Competitive LECs cannot establish business plans or set reasonable expectations without firm intervals; "parity" intervals and benchmarks are not sufficiently precise or rigorous to be useful in the commercial world. Thus, for example, when NorthPoint customers (ISPs or other commercial ventures that retain end-user relationships) require information about when loops will be installed to support DSL, it is not an adequate response for NorthPoint to advise that the service will be installed within one standard deviation of SWBT parity. Rather, to provide for realistic customer expectations, installation and related intervals should be firm benchmarks, and those benchmarks, in turn, should be no longer than the intervals that SBC/Ameritech provide their own retail analog services. In this way, NorthPoint and other competitive LECs can set expectations and advise their customers based on specific time periods.

Moreover, the establishment of specific intervals would permit the SBC/Ameritech performance measures to test performance against such intervals rather than against a vague test of "parity." Measurements 2b, 3a, 3b, 4a, 4b, 5a, 5b, 6 (DSL), 7, 8a, 8b, 9a, 9b, 10a, 10b, 11a, 11b, and 16 should be modified to establish that performance measures will be based upon contracted or established fixed intervals, and that those intervals shall be no greater than the intervals at which SBC/Ameritech provide such services in their own retail operations.

C. Performance Measures Should Be Modified to Ensure that Intervals are Not "Gamed"

Some of the intervals specify "starts" and "stops" based on particular actions by the incumbent LEC, particularly installation of unbundled loops and related services. For example, measure 2b assesses whether SBC/Ameritech complete installations on "due dates." These due dates are returned from the incumbent LEC to the competitive LEC in the Firm Order Confirmation (FOCs). In NorthPoint's experience, the use of this procedure may be susceptible to "gaming." Specifically, an incumbent LEC may subsequently issue a supplemental FOC with *new* installation dates. In some cases, these new FOCs may be provided only hours before, or even after, the originally scheduled installation.

These incumbent LEC practices undermine competition and the ability of competitive LECs to provide service. As this Commission noted previously, "Timely return of a FOC notice is critical because it informs the competing carrier of the status of its order by (1) confirming that the order has been accepted, and (2) providing the due date for installation of service."[20] To ensure that installation intervals are not "gamed" in this manner, the rules for loop installations and related measures should clarify that the "due date" is that date provided by the incumbent LEC in the original FOC – the one required in measurement 1 to be delivered within hours of the loop order. This clarification should be made to measurements 2a, 2b, 2c, 5a, 5b, and 5c.

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[20] *Application of BellSouth Corp., at al., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order in CC Docket No. 98-121, FCC 98-271, at ¶ 120 (released Oct. 13, 1998).

VI. CONCLUSION

For the reasons set forth above, the Commission should clarify and modify the Proposed Conditions consistent with NorthPoint's recommendations and adopt the conditions in connection with the license transfer in the proposed SBC/Ameritech merger.

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I, Charles W. Logan, do hereby certify that on this 19th day of July, 1999, I caused a copy of the foregoing Comments of NorthPoint Communications, Inc. to be served upon each of the parties listed on the attached Service List by first class mail, postage prepaid.

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